No. 15,625

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GIUSTINA BROS. LUMBER CO., RESPONDENT

On Petition for Enforcement of An Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order issued against respondent on August 21, 1956. The Board's decision and order (R. 214)[1] are reported at 116 NLRB 700. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at respondent's lumber mill in Eugene, Oregon, where respond-

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[1] References designated "R." are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. Relevant provisions of th Act appear in the Appendix, *infra*, pp. 38-41.

ent is admittedly engaged in interstate commerce (R. 101; 18).

STATEMENT OF THE CASE

Briefly, the Board found that respondent committed violations of Section 8 (a) (1), (3), and (5) of the Act, respectively, by attempting through threats and other unlawful interference to break a strike of its employees, by subsequently rejecting an unconditional application for reinstatement of the strikers, and by refusing to bargain with the union which represented its employees. The subsidiary facts upon which these findings are based may be summarized as follows:

I. The Board's Findings of Fact

A. *The Union, pursuant to the wage renegotiation provisions of its contract, requests a wage increase, and calls a strike when respondent rejects the request*

Respondent and the Union (Lumber and Sawmill Workers, Local Union No. 2611, AFL-CIO) have for many years been parties to successive collective bargaining agreements usually negotiated in their behalf by their respective agents, the Willamette Valley Lumber Operators Association, hereafter called the Operators Association, and the Willamette Valley District Council of the Lumber and Sawmill Workers, hereafter called the District Council (R. 102; 251-253, 259-263).[2] On May 8, 1953, respondent and

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[2] The Operators Association is a non-profit Oregon corporation which limits its membership to employers engaged in a forest products industry. From time to time, Associa-

the Union entered into a revision of their collective bargaining agreement. The revised agreement contained, *inter alia*, a 75-day modification and termination clause, and a 15-day wage-reopening clause (R. 102, 105-106; 37). These clauses, Article XIII and Article VIII, read as follows (R. 38, 40):

> Article XIII:
>
> This agreement terminates on 1 April 1954, but shall automatically extend from year to year unless either party hereto shall have given written notice to the other party at least seventy-five (75) days preceding April 1 of any year of its intention to modify, revise, adjust, or terminate this agreement, specifying in such notice the provisions that it desires to modify, revise, or adjust, or its desire for termination.
>
> Upon the receipt of such notice the other party shall thereupon and not less than sixty (60) days prior to April 1 of that year, offer any proposals it may have for modification, revision, adjustment, or termination of this agreement.
>
> Article VIII:
>
> Wages shall continue subject to the right of either party to request a general wage change by giving the other party written notice of its desire for such general wage change. Negotiations shall commence within fifteen (15) days from the date the notice is received.

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tion members, as respondent here, have delegated limited authority to an Association Committee to negotiate with the bargaining representatives of employees of such members. The District Council is an association of labor organizations chartered by the United Brotherhood of Carpenters and Joiners of America, and includes the Union here (R. 106-107; 19, 251).

On February 10, 1954, the District Council, acting as agent for the Union (R. 108-109; 55, 269) and pursuant to Article VIII, notified respondent, as well as a number of other lumber companies under contract with constituent locals of the District Council, that it wished "to open negotiations for an increase of wages for all of your employees who are represented by our union" (R. 109-110; 41, 251). Respondent replied on February 20 questioning the District Council's representative status, and the Union advised respondent by letter dated March 10 that the District Council was authorized to "open and negotiate" wage issues in its behalf (R. 110; 42-43). Respondent made no reply to the March 10 letter and on April 9, the District Council repeated its request for the opening of wage negotiations (R. 110-111; 44). Finally, on April 13 respondent notified the District Council that it had authorized the Operators Association to represent, but not to bind, respondent in such negotiations (R. 111-112; 45).

Thereafter, on April 28, the District Council and the Operators Association began industry-wide negotiations respecting the wage demands of lumber company employees in the Pacific Northwest (R. 112-113; 20, 273-275). While as a result of these negotiations, some employer-members of the Asociation reached agreement with the District Council on this issue, respondent and other employers did not (*ibid.*). On June 20 the District Council made a direct request to respondent for a wage offer but respondent rejected the request (R. 116; 271). On the following day the Union, pursuant to a strike vote, called a

strike of respondent's employees (R. 116-117; 20, 27-28).[3] On June 28, one week after the strike began, Howden, business agent of the Union, advised respondent that he would be willing to transmit a wage offer by respondent to the District Council. President Giustina replied that there would be no offer except that respondent was willing to resume operations on the basis of wages and working conditions in effect when the strike began (R. 117-118; 288-289, 309).

B. *Respondent actively participates in a back-to-work movement and threatens to discharge employees who fail to abandon the strike*

During the latter part of July discussions took place among some of the strikers concerning the desirability of revoking the District Council's authority to represent the Union in wage negotiations. On or about July 24, Robertson, Winey, and a group of other employees asked the Union's president to call a union meeting in that regard (R. 118-119; 20, 94-95). Such a meeting was held on the night of July 28, but the Union's grant of authority to the District Council was not withdrawn (R. 119; 20-21).

Immediately after the union meeting, however, a group of employees gathered outside the union hall to discuss the possibility of a return to work (R. 119; 21). During this discussion a suggestion was made that the group adjourn to the parking lot at respondent's plant (*ibid.*). When the employees reached

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[3] Strikes occurred also at other plants still engaged in the wage dispute (R. 117; 274-275).

the parking lot at about 9:30 or 10:00 o'clock, they found that the doors of respondent's machine shop were open and that some benches had been arranged to accommodate an audience (R. 119-120, 155; 21, 291). The group utilized these facilities for a meeting (*ibid.*).

The machine shop meeting, as the open doors and the arrangement of the benches suggest, was not impromptu. Earlier that evening Employee Robertson had called Sam Hughes, respondent's labor relations director, to invite him to a meeting of employees to be held at the plant "shop" later that night (R. 120; 156; 304-310). Hughes interposed no objection and asked whether he might bring along someone else. Receiving an affirmative reply, Hughes asked Natale and Ehrman Giustina, respondent's president and production manager respectively, to come along (R. 121; 21, 256-257, 310-311). Among those present at the meeting also were four employees who had earlier been invited by Employee Johnson to attend a "secret" meeting at the machine shop (R. 122-123, 154-155; 277-283).

Employee Robertson opened the meeting, stating that those present knew why they were there and that he had invited "the bosses" to answer questions.[4] Hughes and the two Giustinas thereupon joined the assembly. Hughes took charge and inquired whether everyone present had been invited. When Robertson remarked that a few employees were present "who should not

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[4] The facts relating to the machine shop meeting derive, unless otherwise noted, from a stipulation entered into by the parties at the hearing (R. 121-134, 154-163; 21-33).

be present," respondent's representatives conferred with Robertson. Hughes thereafter specifically asked the four Johnson invitees whether they had been asked to come and learned that Johnson had invited them. In response to further questions, Hughes was told further that no general invitation had been issued but that Union Business Agent Howden could have been present if he had wished to attend.

Hughes then asked the men whether they had anything to say. Receiving no response, Hughes began an extensive discourse during which he expressed the hope that none of those present would risk being called "rats" by informing "to the hotshots," and stated "Now if any of you want to leave I'm sure it will be satisfactory to everyone else. Well, I'm sure I don't need to tell you what will happen to you in the future." When no one responded to this suggestion Hughes said, "Very well, we will assume everyone here feels as you do."

In the course of his ensuing remarks Hughes, after disclaiming any intention to "knock" or "break" the Union, stressed that the Union leaders, having the power "to dictate the lives" of several thousand men, should exercise their power responsibly. In that connection Hughes described the strike as "entirely uncalled for"; stressed the cost of the strike to the employees; pointed out that respondent could have lowered wages, and then settled for a fictitious increase; argued that respondent's current wage policy was desirable because of the "steady work" provided by respondent; and advised that the men had a right to refrain from striking. In answer to a question by one of the employees concerning the Union's strike

vote, Hughes stated that he did not "have much respect" for such a vote and refused to believe that it represented the "wishes and desires" of the entire unit represented by the Union.

President Giustina then addressed the employees. He made clear that upon resumption of operations, respondent would maintain the same wages, hours and working conditions and that while he preferred to pay and assign work to the men solely on the basis of ability without regard to seniority, the Union prevented this by trying "to make [them] all the same like sheep." He stated further that he would resist any refusal by strikers to work with those who had earlier abandoned the strike, and that so long as their dues were paid, returning strikers were protected from Union attempts to have them discharged. In reply to an inquiry as to why the District Council did not wish the men to return to work, Hughes said that the members of the Council were interested only in their own jobs and in the money they collected from the employees. President Giustina agreed that the employees would be well advised to be just as concerned about their own jobs.

At this point in the discussion, an employee raised the question whether those employees present could withdraw from the District Council or perhaps form a new union. Hughes interposed that "This is not the time nor the place to discuss anything like that." When a further suggestion was made that the men "get this started," Hughes and the two Giustinas withdrew, and Robertson called for a show of hands from those who wished to return to work, advising

Johnson and his four invitees to leave if they were unwilling to return to work as yet. A majority voted to return to work the next morning. Hughes and the two Giustinas were invited back to the meeting, were advised of the vote, and agreed to restore the men to work the following morning.

The following day, July 29, a sufficient number of strikers returned to work to warrant resumption of operations (R. 134; 33). On August 5, respondent sent to each employee still on strike a letter stating that if he did not return to work by August 9, "it will be considered that you have severed your employment and we will look to others to fill the jobs" (R. 134; 8-9, 33-34, 249-250). At a meeting held on August 8 the majority of the remaining strikers voted to return to work only as a group under the sponsorship of the Union (R. 134; 271-272).

C. *Respondent rejects the Union's request to bargain respecting a settlement of the strike, and repudiates its contract with the Union*

On August 25, a petition for decertification of the Union as bargaining representative of respondent's employees was filed with the Board (R. 135; 34, 52).[5]

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[5] The petition was prepared by a group of employees which included Winey, one of those who along with Robertson had sought to oust the District Council (*supra*, p. 5). The Board's Regional Director on December 6, 1954, dismissed the petition on the ground that "the collective bargaining agreement currently in effect between the company and Local 2611 of the Lumber and Sawmill Workers Union, AFL, constitutes a bar to investigation of representatives at this time" (R. 135, 138-139; 34, 46). Thereafter, on March 8, 1955, the Board rejected a request for review of this dismissal, holding, consistent with settled practice, that it would not

On August 26, after consultation with the Governors of Oregon and Washington, representatives of the companies and unions involved in the industry-wide strike agreed upon a settlement procedure which provided for termination of the strike and appointment of a Fact Finding Board to investigate and report upon the disputed issues (R. 135-136; 34, 48).

On August 31, the Union presented a copy of the Governors' Proposal to respondent as a basis for a settlement of the strike (R. 137; 34-35). Respondent, however, refused to negotiate with the Union on the ground that the petition for decertification had put the Union's majority status in issue (R. 137; 35). Union Business Agent Howden then asked whether respondent would negotiate with the Union if its status as exclusive bargaining representative were clear, and received an affirmative reply (R. 137; 36). On September 2, however, respondent advised the Union by letter that their collective bargaining agreement "is terminated" (R. 138; 36, 50). The Union responded on September 13th that the agreement could be terminated only under Article XIII which provided for 75 days' notice (R. 138; 54).

D. *Respondent offers the Union a wage increase but refuses to discuss its unfair labor practices.*

On December 22, the Governors' Fact Finding Board recommended the adoption of a wage increase of 7½ cents an hour by the employers involved in

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entertain the petition in view of the issuance of a complaint alleging unfair labor practices by respondent (R. 152; 34).

the industry-wide dispute (R. 139; 58, 60). On January 8, 1955, at respondent's suggestion, representatives of respondent, the District Council, and the Union met to discuss certain "new matters" which had developed since the August 31 conference at which respondent cited the decertification petition as ground for refusing to deal with the Union.[6]

Respondent made clear at the outset that it was not waiving any question of representation raised by the decertification petition, but advised that it was willing to put into effect the 7½-cent increase which the other employers in the lumber industry had adopted.[7] District Council Secretary Kraal and Union Representative Howden pointed out that there were "some other disputes" between respondent and the Union resulting from the fact that respondent had "[c]ommitted unfair labor practices." In this connection the Union cited, *inter alia*, respondent's renunciation of the bargaining agreement with the Union, its earlier refusal to negotiate with the Union, and its insistence that all the strikers had been replaced and were no longer employees of the company. The Union took the position that resolution of the wage issue alone could not be the basis for

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[6] As in the case of the July 28 machine shop meeting, the facts relating to the January 8 meeting derive from a stipulation of the parties (R. 140-150, 175; 60, 62, 63-64, 65, 72-75, 79, 80-81, 82-83, 85).

[7] Except for respondent, all the employers still involved in the industry-wide dispute entered into settlement agreements on the basis of the Fact Finding Board's recommendations, and the strike was called off as to them (R. 174-175; 274-275).

settlement of the strike unless respondent was also willing to discuss the "other matters." The meeting ended on this note.

E. *The strike is terminated, but respondent rejects the strikers' unconditional application for reinstatement*

On January 13, 1955 respondent by letter reaffirmed its notice of September 2, 1954, terminating its agreement with the Union (R. 150; 15). The Union's reply on January 18 reiterated its earlier position, expressed September 13, that since the agreement had not been terminated on 75 days' notice, it was still in effect (R. 150; 16).

On January 19, the Union formally terminated its strike, notified respondent to that effect and unconditionally requested reinstatement of the strikers (R. 150-151; 36, 50-51). The strikers themselves sent respondent two letters to the same effect (R. 151; 36). Respondent replied by letter dated January 22 that there were no "vacancies" at its plant (R. 151; 36, 51).

II. The Board's Conclusions of Law

The Board found that respondent by the foregoing course of conduct interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act, defaulted on its statutory bargaining obligation in violation of Section 8 (a) (5), and discriminatorily denied reinstatement to strikers in violation of Section 8 (a) (3). Specifically, the Board found that respondent had violated Section 8 (a) (1) and (5) of the Act by knowingly acquiescing in the

use of its premises for the promotion of a back-to-work movement; by actively participating in that movement;[8] by making a direct appeal to the employees to abandon the Union and the strike and to accept respondent's offer, rejected by the Union, to maintain existing wages and working conditions; by threatening the strikers with loss of employment if they did not abandon the strike; by refusing to negotiate with the Union; and by repudiating its contract with the Union (R. 214-216, 152-190, 195-196). The Board predicated its finding of a Section 8 (a) (3) violation on the premise that respondent by its unfair labor practices had converted what was originally an economic strike for higher wages into an unfair labor practice strike, that the strikers were thereby entitled to reinstatement upon application, and that respondent's rejection of their application for reinstatement constituted discrimination violative of the Act (R. 173-176, 186-187). In making the foregoing findings, the Board rejected various defenses which were advanced by respondent and which are discussed *infra*, pp. 20-27.[9] On September 26, 1956, the Board denied respondent's motion for reconsideration (R. 239-240).

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[8] Chairman Leedom was of the view that respondent's participation in the employees' back-to-work meeting warranted an unfair labor practice finding and made it unnecessary to decide whether respondent also unlawfully participated in prearranging that meeting (R. 215, n. 2).

[9] One Board member took the view that a Section 8 (d) defense discussed below, pp. 31-37, was valid and warranted dismissal of the entire proceeding (R. 219-225).

III. The Board's Order

The Board ordered respondent to cease and desist from the several unfair labor practices found and from in any other manner interfering with, restraining and coercing its employees in the exercise of their statutory rights.[10] The affirmative provisions of the Board order contained, in addition to the usual notice-posting provisions, a directive that respondent bargain collectively with the Union upon request, that it reinstate and make whole the employees who were on strike on January 19, 1955, the date of their request for reinstatement, and to the extent that insufficient jobs were available, that it place the remaining strikers on a preferential hiring list. In this connection the Board directed that respondent dismiss, if necessary, persons hired on or after July 28, 1954, when—because of respondent's unlawful conduct—the strike became an unfair labor practice strike (R. 216-219, 225-228).

SUMMARY OF ARGUMENT

I. Substantial evidence supports the Board's finding that respondent engaged in a pattern of conduct constituting interference with, and restraint and co-

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[10] The Board found that "the unfair labor practices attributable to the Respondent disclose an attitude of opposition to the statute's purposes with respect to the protection of employee rights in general; they are closely related to the other unfair labor practices proscribed by the Act, as amended, and a danger of their commission in the future is to be anticipated from the conduct of the Respondent in the past" (R. 194). Under these circumstances, a broad cease-and-desist order is plainly appropriate. *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 436-437.

ercion of its employees in violation of Section 8 (a) (1) and a refusal to bargain in violation of Section 8 (a) (5). Respondent's participation in the "back to work" meeting of July 28, 1954, in which it dealt directly with the employees in derogation of the Union which was their bargaining representative, independently supports such a finding. Respondent's letter of August 5, 1954, informing the strikers that their employment would be terminated unless they abandoned the strike amounted under all the circumstances to an unlawful threat of discharge. Finally, respondent on August 31, 1954, rejected flatly the Union's offer to negotiate a strike settlement and subsequently on September 2, 1954, repudiated its contract with the Union altogether.

Respondent's several defenses for its admitted refusal to bargain with the Union are devoid of merit. The filing of a petition for decertification of the Union as bargaining representative of the employees afforded respondent no warrant for evading its bargaining obligation. Respondent either knew, or is chargeable with knowledge, that its subsisting collective bargaining contract with the Union barred consideration of the petition for decertification. Nor could respondent escape liability for its August 31 refusal to negotiate on the ground that the Union itself attended that meeting with a "closed mind." In the first place, respondent's claim in that regard was patently an afterthought. In the second place, respondent summarily refused to negotiate because of the pending petition for decertification and never gave the Union an opportunity to state its position.

Finally, respondent's claim that the bargaining unit of its employees was inappropriate and that the bargaining obligation was expunged is both lacking in substance and foreclosed by respondent's stipulation that the unit was appropriate.

Respondent's abrupt repudiation of its contract with the Union on September 2, 1954, was not excused by the claim that the Union had already violated the contract by striking in disregard of the grievance procedure set forth in the contract. Substantial evidence supports the Board's finding that the alleged breach was not respondent's true reason for repudiating the contract. In addition, respondent has failed to establish its claim that the strike was a breach of the contract.

II. Substantial evidence likewise supports the Board's finding that the economic strike of the employees was prolonged by respondent's unfair labor practices. Accordingly, respondent's refusal to comply with the strikers' unconditional application for reinstatement constituted unlawful discrimination within the meaning of Section 8 (a) (3) of the Act. The record also supports the Board's finding that respondent abandoned before the Board any issue relating to the validity of the strike under Section 8 (d) of the Act.

ARGUMENT

I. The Board Properly Concluded That Respondent Violated Section 8 (a) (1) and (5) of the Act

A. *Substantial evidence supports the Board's finding that respondent dealt directly with its employees in derogation of the Union's status as exclusive bargaining representative of those employees*

The evidence (*supra*, pp. 5-7) amply supports the Board's finding (R. 154-156) that respondent had advance notice that the machine shop meeting late on the night of July 28 was for the purpose of furthering a back-to-work movement by some of the strikers and that it acquiesced in the use of its premises for such a meeting. The ostensibly spontaneous character of the meeting was belied by the fact that Employee Johnson had earlier that evening invited four fellow-employees to attend it. Moreover, no credible explanation is advanced to explain the unusual circumstance that the machine shop was left open at that late hour, and the even more unusual circumstance that some of the benches had been arranged to accommodate an audience. It is unlikely that such preparations were made without respondent's knowledge and acquiescence, especially since it was customary—even when no strike was going on and normal conditions prevailed—to obtain permission to use the shop for employee meetings which did not involve company business (R. 155-156; 21, 257-259, 295). Finally, further evidence that respondent had advance notice of the machine shop gathering is that Labor Relations Director Hughes knew at the very outset of the meeting and with no announcement being made to that effect that the employees had

gathered to discuss the question of abandoning the strike and returning to work. In the light of this record the Board was plainly warranted in finding that respondent had, at the very least, acquiesced in the use of its premises for furthering a back-to-work movement.

Quite apart from respondent's conduct in this regard, however, respondent's participation in the "back-to-work" meeting independently supports the Board's finding of unlawful interference and refusal to bargain. The record establishes that Labor Relations Director Hughes appealed to the employees to abandon the strike and sought to deal directly with the employees rather than with the Union, their exclusive barganing representative. Thus, Hughes, together with President Giustina, described the strike as "entirely uncalled for," pointed out that the men had a right to refrain from striking, disparaged the representative character of the strike vote and the Union's motives, stated the wages and other terms of employment which would be offered the men if they resumed work (the Union had rejected such an offer), and in effect suggested that unless they accepted such wages and terms, they could not be assured of steady work (*supra*, pp. 7-8). Contrary to respondent's claim, such conduct did not constitute an exercise of free speech but was "a well-settled violation of Section 8 (a) (1) of the Act." *N.L.R.B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 681 (C.A. 9), certiorari denied, 312 U.S. 678; *N.L.R.B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9); *N.L.R.B.* v. *Wooster Division of*

Borg-Warner, 236 F. 2d 898, 905, (C.A. 6), certiorari denied on this issue, 353 U.S. 907; *N.L.R.B.* v. *Clearfield Cheese Co.*, 213 F. 2d 70, 73 (C.A. 6). Moreover, this conduct included direct dealing with the employees in derogation of the bargaining obligation which the Act imposes. See, in addition to the cases already cited, *Medo Photo Corp.* v. *N.L.R.B.*, 321 U.S. 678, 683, 684; *N.L.R.B.* v. *Biles-Coleman Lumber Co.*, 98 F. 2d 18, 22 (C.A. 9).

B. *Substantial evidence supports the Board's finding that the purpose and effect of respondent's letter of August 5, 1954, were to threaten the strikers with discharge*

The record (*supra*, p. 9) also affords adequate basis for the Board's finding (R. 163-167) that respondent's August 5 letter—informing each employee still on strike that he would be regarded as having severed his employment if he did not return to work by August 9—was an effort to bring about an abandonment of the strike through threat of discharge and hence was a further violation of Section 8 (a) (1) of the Act. *N.L.R.B.* v. *Leach & Wallace*, 234 F. 2d 400 (C.A. 3); *N.L.R.B.* v. *Beaver Meadow Creamery*, 215 F. 2d 247, 252-253 (C.A. 3); *N.L.R.B.* v. *United States Cold Storage Corp.*, 203 F. 2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 813, and cases there cited. Respondent's contention that the letter was merely a statement of respondent's right and intention to replace economic strikers falls for two reasons. First, as more fully explained in Point II of the Argument, respondent's unlawful conduct at the July 28 meeting had converted the economic strike into an unfair labor practice strike, thereby

vitiating respondent's normal right of replacement. *N.L.R.B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C.A. 9); *N.L.R.B.* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 404-405 (C.A. 2), certiorari denied, 347 U.S. 953. Second, even assuming that the employees involved were still economic strikers, respondent's August 5 letter could not be regarded as a mere statement of respondent's legal rights where, as here, it followed on the heels of its unlawful participation in a back-to-work movement and its unlawful attempt to bypass the majority representative of the employees. In such a context, it is apparent, as the Board found, that the letter was in fact, and was intended as, a threat of discharge to induce the strikers to abandon the strike. See *Leach and Wallace*, *Beaver Meadow*, and *United States Cold Storage* cases, *supra*. *Kansas Milling* v. *N.L.R.B.*, 185 F. 2d 413 (C.A. 10), upon which respondent relies, lacked this context and is plainly distinguishable. Cf. *Associated Wholesale Grocers of Dallas, Inc.*, 119 NLRB No. 9, with *Kerrigan Iron Works*, 108 NLRB 933, 935-936, affirmed *sub nom Shopmen's Local Union No. 733 etc.* v. *N.L.R.B.*, 219 F. 2d 874, 875-876 (C.A. 6).

C. *The Board properly rejected respondent's several defenses to its direct refusal to bargain with the Union at the meeting of August 31, 1954*

Respondent's flat rejection on August 31, 1954, of the Union's request to discuss a possible settlement of the strike constituted a further violation of its statutory bargaining obligation. In an attempt to justify this action, respondent asserted three defenses before the Board, each of which we shall show is without merit.

1. *The Midwest Piping defense*

Respondent asserts that it was exonerated from its bargaining obligation on August 31 because several days earlier it had been advised that a petition for decertification of the Union as bargaining representative of the employees had been filed with the Board and that the Union's representative status was therefore in doubt. Respondent, in short, seeks to invoke the Board's *Midwest Piping* [11] rule, namely, that an employer must remain neutral when rival claims raise before the Board a question concerning the representation of his employees.

The *Midwest Piping* rule "is a direct outgrowth of the parent doctrine of employer neutrality in matters relating to employees' choice of a bargaining representative. It has long been established that where employees are confronted with a choice of bargaining representatives, the employer may not accord such treatment to one of the rivals as will give it an improper advantage or disadvantage in its contest for the employees' favor [citing cases]." *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2). On the other hand, as this Court observed in *N.L.R.B.* v. *Flotill Products, Inc.*, 180 F. 2d 441, 444, industrial peace, the prime objective of the rule in the first instance, will not be achieved by its "indiscriminate application." See also *N.L.R.B.* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (C.A. 6). Accordingly, as the Board pointed out in the instant case (R. 167-168), a limitation on the rule is that

[11] *Midwest Piping Supply Company, Inc.*, 63 NLRB 1060.

the question of representation must be "real," and where one of the rival claims is "clearly unsupportable or specious," the rule does not apply. In such a situation, an employer would not be required, for example, to refrain from bargaining with an incumbent union. *Wm. Penn Broadcasting Company*, 93 NLRB 1104, 1105; *Wm. D. Gibson Co.*, 110 NLRB 660, 662.

The considerations applicable to situations where, upon a petition for certification, rival claims are involved are applicable also to situations where a petition for decertification is filed. An unsupportable or specious petition for decertification, like a baseless rival claim, should not enable an employer to disregard his otherwise unquestioned "legal duty to bargain with [the Union] in the same manner as it had done in the past." *Flotill*, *supra*, 180 F. 2d at 444; cf. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103.

Applying the foregoing principles to the instant case, the Board found (R. 168) that the petition for decertification was unsupportable and did not raise a "real" question concerning representation so as to relieve respondent of its statutory duty to continue bargaining with the Union. Specifically, the Board noted (R. 170) respondent's awareness of "the fact that its contract with the Union had been renewed automatically earlier in the year . . . and that it was . . . in full force and effect when the decertification petition was filed." [12] Accordingly, as the Board

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[12] The record fully supports this finding. Thus, prior to August 25, 1954, when the petition was filed (*supra*, p. 9),

further noted (R. 169-171), under the Board's well-established "contract bar" rule,[13] consideration of the petition for decertification was barred (*supra*, n. 5).

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neither the Union nor respondent served a 75-day notice of intention to terminate the contract under Article XIII thereof (R. 40; 267-268). The only notice given was the Union's 15-day wage reopening letter of February 10, 1954 pursuant to Article VIII of the contract (R. 41, 268). Moreover, the petition for decertification, which was received by respondent on August 27, 1954 (R. 135; 259) put respondent on notice of "the existence of the contract as a current commitment of the firm" (R. 170), since it cited April 1, 1955 as the expiration date of the contract (R. 135; 53). Finally, respondent itself recognized the continued existence of the contract since it contended at page 43 of its brief to the Board (a certified copy of which has been lodged with the clerk of this Court) that the Union had broken the contract by its strike of June 21, 1954, thereby tacitly admitting that the contract continued in effect despite the Union's February 10 notice. Respondent further contended before the Board (*id.*, p. 44) that even if the Union had not broken the contract, that notice "prevented the automatic renewal of the agreement" on April 1, 1954, its terminal date; that the notice converted the contract into "one for an indefinite period of time, subject to termination by giving reasonable notice of termination," i.e., "sixty days"; and that when respondent gave such notice on September 2, 1954 (*supra*, p. 10), "termination became effective sixty days later." Thus, even under respondent's reasoning, it is clear that respondent was aware of the existence of the contract as of August 25, 1954, when the decertification petition was filed.

[13] The "contract bar" rule, referred to by this Court in *N.L.R.B.* v. *J. I. Case Co.*, 201 F. 2d 597, 600, has been applied by the Board since the early days of the Wagner Act. See *National Sugar Refining Co.*, 10 NLRB 1410, 1415. Under this rule, subject to limitations not relevant here, petitions for certification or decertification are barred from consideration if a valid collective bargaining agreement covering the employees in issue is in effect at the time the petition is filed. *Snow & Neally Co.*, 76 NLRB 390, 391.

Respondent may not evade liability for its conduct in this regard by professing ignorance of these controlling principles. The normal presumption that persons are chargeable with knowledge of statutes and administrative regulations *(Wilber National Bank of Oneonta* v. *United States,* 294 U.S. 120, 124; *Hotch* v. *United States,* 212 F. 2d 280, 284 (C.A. 9)) is equally applicable here where the controlling principles of law have long been established in Board determinations. Cf. *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194, 202.[14]

2. *The defense that the Union attended the August 31 meeting with a "closed mind"*

A second defense asserted by respondent for its refusal to negotiate with the Union respecting a strike settlement on August 31, 1954, was that the Union representatives attended the meeting with closed minds, i.e., that they intended merely to obtain respondent's signature to an agreement incorporating the Governors' proposal, and had no intention to bargain. As the Board pointed out, however (R. 171), the record shows that respondent rejected the Union's request for negotiations for a wholly different reason, i.e., the filing of the petition for decertification (R. 35, 293-294, 302-303, 304). Respondent first asserted its claim of Union intransigence only after Union Business Agent Howden testified at

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[14] In this connection it may be noted that respondent's labor relations director was admittedly "a licensed lawyer well qualified in the specialized field of labor law" (Respondent's brief to the Board, p. 44, *supra,* n. 12.

the hearing before the Trial Examiner that when the District Council received copies of the Governors' proposal on August 27, the Union representatives "were told to go and secure the signatures of the operators on that" (R. 273). It is apparent, therefore, as the Board found (R. 171) that the defense here asserted is a mere afterthought and that respondent's refusal to negotiate a strike settlement was not motivated by any good faith belief that negotiation would be fruitless.

Moreover, the defense is without basis on its merits. Respondent stipulated that Howden said at the meeting, "we want to talk about the Governor's paper" (R. 35). Had respondent complied with its statutory duty to bargain, it might have found that the Union intended to use the Governors' recommendation as a basis for discussion rather than to adopt a "take-it-or leave it" attitude. Respondent failed, however, to give the Union an opportunity to state its position and summarily refused to negotiate because of the pending petition for decertification (R. 35-36). Under these circumstances substantial evidence supports the Board's conclusion (R. 171-172) that the situation "never reached the point, argued by counsel, at which it *could* have been determined that the Union's position was actually inflexible" [italics in original].

3. *The "appropriate unit" defense*

Respondent's third and final defense on this phase of the case, advanced for the first time in its motion for reconsideration (*N.L.R.B.* v. *Pinkerton's Na-*

tional Detective Agency, Inc., 202 F. 2d 230, 233 (C.A. 9)), was that it had no duty to bargain with the Union in any event because respondent's employees did not constitute an appropriate unit (R. 237-239). Respondent relied in this regard on language from Board decisions in *Jones & Anderson Logging Co., Inc.*, 114 NLRB 1203, and *Miller Shingle Co.*, 114 NLRB 1217, to the effect that employers in the lumber industry in the Northwest, participating in industry-wide negotiations, would constitute a multi-employer unit.[15] Respondent argues from this language that since the negotiations here were part of a larger series of industry-wide negotiations over the wage issue in the Pacific Northwest, only a multi-employer unit was appropriate.

The short of the matter is that the language and holdings of the cited cases with reference to appropriate units turn on the particular facts there under consideration and the different facts in the present record make the cited cases of little aid here. Moreover, the instant record establishes conclusively that respondent's employees constitute an appropriate unit within the plain intendment of Section 9(b) of the Act. Thus, the parties expressly stipulated before the Board that the unit here in issue, the identical one covered by the contract, "is now and at all times material herein was an appropriate unit" for purposes of collective bargaining (R. 18). In this state of the record, respondent's belated objections respect-

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[15] The actual holdings of the cited cases were that the particular employers involved were not part of a multi-employer unit.

ing the unit represented by the Union were properly rejected by the Board.

D. *The Board properly concluded that respondent's repudiation of its contract with the Union was unlawful*

As shown in the Statement, p. 10, respondent in a letter dated September 2, 1954, notified the Union that their collective bargaining agreement "is terminated." Respondent in its letter did not cite any reason for the termination, and the contract contained no provision covering such action except for the provisions of Article XIII which were plainly inapplicable (see text of provisions, *supra*, p. 3), and which respondent did not even purport to invoke. Accordingly, the Board properly concluded (R. 173) that respondent "terminated its agreement with the Union in a further effort to justify its refusal to negotiate with that organization in regard to a strike settlement."

Respondent's repudiation of its agreement and of its bargaining relationship with the Union plainly violates the bargaining obligation (see *N.L.R.B.* v. *Shannon & Simpson Casket Co.*, 208 F. 2d 545, 548 (C.A. 9)) and likewise constitutes unlawful interference, restraint and coercion within the meaning of Section 8 (a) (1). *N.L.R.B.* v. *Biles Coleman Lumber Co.*, 98 F. 2d 18, 22-23 (C.A. 9). Especially in view of respondent's prior unlawful conduct, the Board could fairly conclude, as it did (R. 173), that the abrupt termination "was reasonably calculated to impair the Union's position as the exclusive bar-

gaining representative of the firm's employees, and that it could be expected at the very least to persuade them, whether strikers or strikebreakers, that the Union had lost its influence as their bargaining agent."

Respondent before the Board sought to justify its termination of the contract by asserting that the Union had theretofore broken the contract by calling a strike without resorting to the contract grievance procedure. This proffered defense is without substance. The fact of the matter is, as the Board found (R. 179), that the Union's alleged breach of contract was not at all the real reason for respondent's action but a mere "afterthought," never advanced until after the instant proceeding was initiated. Prior thereto, the only reason assigned by respondent for rejecting the Union was the pending petition for decertification (R. 137, 171, 178; 35, 293-294, 302-303, 304).

Under these circumstances it is almost superfluous to note that respondent, having advanced the Union's alleged breach of contract as an affirmative defense, failed to establish that defense, as the Board found (R. 179-182). Article IX of the contract (R. 38-40) concededly prohibits strikes and lockouts pending exhaustion of the grievance procedures outlined in Article II, and such grievance procedures are made applicable to "all complaints arising out of this collective bargaining relationship." However, the terms "complaints" and "grievances" are used interchangeably in Article II and are clearly limited to a "complaint . . . in regard to his [the employee's] individ-

ual working conditions, individual rate of pay, individual promotion, demotion, discharge, lay off, or suspension for cause, arising under the terms of this agreement and such complaint not having been disposed of by the immediate supervisor of the employee concerned to the satisfaction of the employee" (R. 102-103, 180).[16] The quoted language clearly does not contemplate that a general wage dispute—the cause of the strike herein—should constitute a grievance or be subject to grievance procedures. Indeed, the procedure to handle general wage disputes is outlined in a separate section of the contract, namely Article VIII (*supra*, p. 3). Moreover, the parties have uniformly regarded general wage disputes as falling outside the purview of the grievance procedures, and general wage negotiations under Article VIII have traditionally been conducted on behalf of the parties by the District Council and by the Operators Association (*supra*, pp. 2, 4).

II. The Board Properly Concluded That Respondent's Refusal To Reinstate the Strikers Violated Section 8 (a) (3) and (1) of the Act

A. *Substantial evidence supports the Board's finding that the strike was prolonged by respondent's unfair labor practices*

During the conference of January 8, 1955, at which respondent offered a wage increase of 7½ cents per hour, both the Union and its negotiating

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[16] The text of Article II is contained in G.C. Ex. 2, App. A, which because of its length was omitted from the printed transcript of Record.

agent, the District Council, informed respondent that the wage increase, which had been recommended by the Governor's Fact Finding Panel as a basis for strike settlement, could be discussed only if respondent also discussed its unfair labor practices (*supra*, p. 10-12). This circumstance, undisputed on the record, points up the validity of the Board's finding (R. 173-176) that the strike which had begun merely as an economic strike in support of a wage demand was converted and prolonged by respondent's subsequent unfair labor practices into an unfair labor practice strike. Viewed against respondent's participation in the back-to-work meeting on July 28, its letter of August 5 threatening the strikers with discharge unless they returned to work, its direct refusal to bargain with the Union on August 31, and its repudiation of the collective bargaining agreement two days later, the propriety of the Board's finding is manifest. *N.L.R.B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 249 (C.A. 9); *N.L.R.B.* v. *Pecheur Lozenge Co.*, 209 F. 2d 393, 404-405 (C.A. 2), certiorari denied, 347 U.S. 953, and cases cited. The strikers thereupon became unfair labor practice strikers and respondent was obliged to reinstate them upon their unconditional application, discharging, if necessary, replacements hired after it had engaged in unfair labor practices. *Pecheur*, *supra*, and cases cited. Respondent's refusal to comply with the request for reinstatement constituted, as the Board found (R. 186-187, 196), discrimination violative of Section 8 (a) (3) and (1) of the Act. *Mastro Plastics* v. *N.L.R.B.*,

350 U.S. 270, 278; *N.L.R.B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 907-908 (C.A. 9).[17]

B. *The Board properly concluded that no Section 8 (d) issue was before it for determination inasmuch as respondent had abandoned any reliance on that Section*

Section 8 (d) of the Act, set forth in full in the Appendix, *infra*, pp. 38-40, provides in substance that no party to a collective bargaining contract shall terminate or modify such contract unless the party desiring such termination or modification (subsection 1) gives a 60-day notice to the other contracting party; (subsection 2) offers to negotiate a new or modified contract; (subsection 3) serves appropriate notice upon federal and state mediation agencies of the existence of a dispute; and (subsection 4) continues the existing contract in full force and effect without resorting to strike or lockout for 60 days or until the expiration date of the contract whichever occurs later. The section further provides that any employee who strikes within the 60-day period shall lose his employee status.

At the outset of the Board proceeding, respondent in its answer to the complaint alleged that the strike was "a breach of the labor agreement" and "con-

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[17] Should the Court disagree with the finding that the strike herein was converted to an unfair labor practice strike, the appropriate action would then be to remand the case to the Board for further proceedings to determine which of the strikers had not been replaced so as to entitle them to reinstatement as economic strikers. *Pecheur, supra,* 209 F. 2d at 400; *Kansas Milling* v. *N.L.R.B.*, 185 F. 2d 413, 420-421 (C.A. 10).

stituted an unfair labor practice within the meaning of the Act" (R. 11). In its brief before the Trial Examiner, p. 23 (a copy of that brief has been lodged with the Clerk), respondent amplified this allegation, asserting that the strike occurred while the contract was in effect, contrary to the statutory requirement that a "party proposing modification continue to work without stoppage for 60 days or termination of the contract, whichever occurs later." Accordingly, respondent urged that it was relieved of its statutory bargaining obligation.

Since respondent's contention was bottomed on the language of subsection 8 (d) (4), the Trial Examiner confined himself to a consideration of the impact of that subsection on the strike called by the Union. He concluded that under existing authority, respondent's contention was "without merit" (R. 182). He noted further (*ibid.*) that respondent had not, prior to the Board proceeding, sought to justify its refusal to bargain on any claim of strike illegality. Indeed, respondent in the cited brief (p. 23) decried the importance of the Section 8 (d) issue and disclaimed any intention "to push this point in more detail."

Upon issuance of the Trial Examiner's Intermediate Report, respondent filed voluminous exceptions (R. 205-214) and a supporting brief before the Board. Only three of the 95 exceptions could be deemed relevant to the issue here involved. These exceptions were (R. 213):

> 83. To the conclusion that Respondent sought to justify a refusal to bargain upon the existence of a strike * * *

84. To the finding that Respondent dealt with the Union through the Willamette Valley Lumber Operators Association after the strike * * *
85. To the finding that Respondent did not seriously present the issue of an unlawful strike * * *

Respondent's brief in support of its exceptions made merely a passing reference (p. 42) to the *Lion Oil Manufacturing* doctrine.[18] On this state of the record the Board concluded that (R. 215-216):

> Insofar as any 8 (d) issue was raised, the Trial Examiner found that it was limited to 8 (d) (4) and concluded that * * * there was no merit to the contention. In its exceptions to the Board, the Respondent did not take issue with the Trial Examiner's so limiting the 8 (d) issue nor with his failure to consider that 8 (d) (1), (2), or (3) were involved in the case. Also the Trial Examiner stated that Respondent sought to justify its refusal to bargain because the employees were on strike. The Respondent excepted to this statement. Necessarily, the Respondent thereby completely negated any reliance upon Section 8 (d) (4). Consequently, we believe that any 8 (d) issue that may have been raised before the Trial Examiner was thereafter aban-

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[18] See *Lion Oil Company*, 109 NLRB 680 where the Board set forth its interpretation of the 60-day requirement of Section 8 (d) (4). The Board's order in that case, predicated in part on the rejection of a Section 8 (d) defense, was set aside by the Eighth Circuit. 221 F. 2d 231. On the Board's petition for certiorari, the Supreme Court reversed the Eighth Circuit and remanded the case for further proceedings. 352 U.S. 282.

> doned by the Respondent and the issue is not now before the Board.[19]

Thereafter, the Board issued an order denying respondent's motion for reconsideration on the ground that "contentions raised in respect to Section 8 (d) were previously considered by the Board" (R. 239-240).

We submit that neither respondent's exceptions nor its supporting brief presented to the Board the question whether the strike called by the Union violated Section 8 (d) of the Act. The Board correctly noted that respondent nowhere took issue with the Trial Examiner's failure to address himself to the validity of the strike under subsections 8 (d) (1), (2), and (3) of the Act. Indeed, respondent made no specific reference whatever to these subsections and the record lacks much of the data which would be relevant in that regard. Similarly, respondent's exceptions, to the extent they are relevant at all (*supra*, pp. 32-33), indicate that respondent before the Board disavowed any reliance even upon Subsec-

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[19] One Board member disagreed with the holding that the Section 8 (d) defense had been abandoned and concluded that application of the Section 8 (d) provisions to the facts of the instant case would require dismissal of the complaint (R. 219-225). Under the majority view, however, the Board was not required to, and did not rule on the impact of Section 8 (d). Such a ruling would be required only if the Court should conclude that the Board's "abandonment" determination was wrong and remand the matter for agency determination as a prerequisite to judicial review. See *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 20; *N.L.R.B.* v. *Thayer Co.*, 213 F.2d 748, 755 (C.A. 1), certiorari denied, 348 U.S. 883.

tion 8 (d) (4). Thus exception 83, as the Board noted, disclaimed reliance upon the strike as a basis for the refusal to bargain (R. 182).[20] Exception 84, in the context of the finding there challenged (R. 182), may fairly be read as raising only the factual question whether respondent, after the strike, dealt with the Union through the Willamette Valley Lumber Operators Association. Finally, exception 85 raises only the correctness of the Trial Examiner's observation, based on respondent's own statement in its brief, that respondent did not seriously urge the issue of an unlawful strike. Under these circumstances, the Board correctly declined to pass upon any Section 8 (d) issue in its Decision and Order and likewise properly rejected respondent's effort to revive the issue in its motion for reconsideration. *Kovach* v. *N.L.R.B.* 229 F. 2d 138, 144 (C.A. 7).

The Board's declination to deal with the Section 8 (d) issue was, therefore, a reasonable exercise of its administrative discretion. It is a sound and familiar principle that a judicial tribunal, as well as a quasi-judicial administrative tribunal, may in its discretion

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[20] In its motion for reconsideration, respondent sought to evade the consequences of this disclaimer by urging that the Board had not read exception 83 as it was intended and that it was really intended to raise the issue of strike illegality. But even on the most generous reading, exception 83 states only what respondent does *not* argue; it omits any statement as to what respondent *does* argue. Respondent cannot in a motion for reconsideration remedy its earlier failure to set forth its Section 8 (d) defense in explicit terms. *N.L.R.B.* v. *Essex Wire Corp.*, 245 F.2d 589, 591 (C.A. 9) ; *N.L.R.B.* v. *Pinkerton's supra,* 202 F. 2d at 233.

decline to deal with issues not pressed before it. See *N.L.R.B.* v. *Kovach*, *supra*, 229 F. 2d at 143-144; *Amalgamated Meat Cutters* v. *N.L.R.B.*, 237 F. 2d 20, 27 (C.A. D.C.), certiorari denied, 352 U.S. 1015 (on rehearing); cf. *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481, n. 9.

By the same token, no Section 8 (d) issue is presented to this Court for review. Section 10 (e) of the Act provides that "No objection not urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *N.L.R.B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388; Rules and Regulations of the National Labor Relations Board, Section 102.46 (29 CFR Sec. 102.46). As the Supreme Court has pointed out, the purpose behind the statutory prohibition is to afford the Board an "opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *N.L.R.B.*, 318 U.S. 253, 256. In order to give the Board such an opportunity, objections must be sufficiently explicated to apprise the Board of the nature of the objection. *Id.* at 255. In the instant case respondent's objections not only lacked the explicitness which could so easily be achieved by specific reference to the statutory provisions invoked; they could fairly be read, as the Board did read them, as abandoning any reliance on those provisions. Here, as in *N.L.R.B.* v. *Pinkerton*, 202 F. 2d 230, 232-233 (C.A. 9), there are no extraordinary circumstances warranting a departure from the salutary principle

of making presentation of an issue to the Board a prerequisite to judicial review.[21]

CONCLUSION

For the foregoing reasons, we respectfully submit that a decree should be issued enforcing the Board's order in full.

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November 1957.

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[21] To the extent that *N.L.R.B.* v. *Spiewak,* 179 F. 2d 695, 701-702 (C.A. 3), relied upon by respondent, may be read to the contrary, we submit that this Court's view, as set forth in *Pinkerton,* is the correct interpretation of the law here applicable.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to

wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * *

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3),

and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

SEC. 10 (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of

the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order; and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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